SUPREME COURT, U.S.

No. 73-1233

FILED
NOV 12 197
MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NATIONAL LABOR RELATIONS BOARD AND
PETER G. NASH, GENERAL COUNSEL,
Petitioners,

v.

SEARS, ROEBUCK AND COMPANY,
Respondent.

On Writ of Certiorari To The United States Court of Appeals for The District of Columbia Circuit

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BRIEF FOR *AMICUS CURIAE* FREEDOM OF INFORMATION CLEARINGHOUSE

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BRIEF FOR *AMICUS CURIAE* FREEDOM OF INFORMATION CLEARINGHOUSE

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae Freedom of Information Clearinghouse is representing the interests of those persons who, regardless of any commercial interest, seek access to the full spectrum of information available from the government. While we believe that a democracy can function properly only when there is an open government and an informed electorate, we recognize that even

in a democracy certain information must at times be kept confidential for the benefit of the country. Too much governmental secrecy, however, benefits neither the people nor the government but breeds mistrust and impedes efficient government operation.

The Freedom of Information Clearinghouse was established in 1972 as part of the Center for Study of Responsive Law, which is a publicly supported foundation. The Clearinghouse was created in order to increase public access to government controlled information. It collects and disseminates relevant information by mail and through speeches, conferences, articles, and testimony before Congressional committees concerning the public's rights of access. It is one of the few places to which persons without a significant financial stake in securing information can turn to obtain experienced legal assistance. As a consequence, 22 of the 95 Freedom of Information Act (FOIA) cases in litigation on September 1, 1974 were being handled by a Clearinghouse attorney. [1]

The Clearinghouse has chosen to file an *amicus curiae* brief in this case because it believes that this Court's decision may have an impact reaching far beyond this particular case. We have discussed the parameters of exemption

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[1] *See* Department of Justice, A List Of Suits Filed Under 5 U.S.C. 552 That Are Being Handled By The Civil Division As Of September 1, 1974. The Clearinghouse also filed an *amicus curiae* brief in one other case then pending. Congress has recently recognized that "often the barriers presented by court costs and attorneys' fees are insurmountable for the average person requesting information," and has proposed legislation allowing awards of attorneys fees to persons who substantially prevail in Information suits against the Government. S. Rep. No. 93-854, 93d Cong., 2d Sess. 17 (1974). If finally enacted, we anticipate that the Clearinghouse's percentage of the country's litigated cases will decline.

5 of the Freedom of Information Act, 5 U.S.C. §552(b)(5) (1970), in depth so that the Court will have a full picture of the underlying issues and, whatever the outcome, it will not inadvertently cripple either the government's interest in protecting certain deliberations or the public's interest in securing all available information on the workings of its government.

STATEMENT

On April 6, 1971, Sears, Roebuck and Co. (Sears) filed a charge of alleged unfair labor practices with the Seattle Regional Office of the National Labor Relations Board (NLRB) (Pet. Br. 8).[2] The case was submitted to the Division of Advice (then the Advice Branch) in accordance with section 101.8 of the NLRB's Statements of Procedure, 29 C.F.R. §101.8, which provides that in cases involving novel and complex legal issues "the regional director . . . *must* submit the cases for advice from the general counsel" (emphasis added). Apparently the Division of Advice decided the issues unfavorably to Sears, since the regional director notified Sears that no complaint would be filed (A. 12-13, 21-23), and the General Counsel concedes that "the Regional Director rarely, *if ever*, disregards advice on legal issues" (Pet. Br. 6). Unless administratively appealed, such initial decisions are final, and a charging party's access to Board proceedings are cut off (A. 198-200).

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[2] "Pet. Br." refers to the Brief for the Petitioners in this Court. "Pet. App." refers to the appendix to the petition, "Op. App." to the appendix to the respondent's brief in opposition to the petition, and "A" to the separate appendix printed pursuant to Rule 36.

At this point, Sears requested copies of: (1) the advice memorandum in its case; (2) advice and appeals memoranda dealing with similar issues within the preceding five years; and (3) an index of the advice and appeals memoranda. The General Counsel denied Sears' requests, claiming that exemptions 5[3] and 7[4] of the Freedom of Information Act gave him a right to keep this information secret (A. 19). In August, 1971, Sears filed suit under the Freedom of Information Act, 5 U.S.C. §552, in the United States District Court for the District of Columbia seeking access to all three categories of requested documents.

Meanwhile, Sears had appealed the initial decision to the General Counsel and made both written and oral presentations. As a result, the Acting General Counsel reversed the initial decision, an extremely rare occurrence when his Office has previously issued an advice memorandum, and ordered the issuance of a Board complaint, which was filed on September 1, 1971 (A. 32-37). Finally, in February, 1972, six months after the filing of the FOIA complaint and five months after the filing of the unfair labor practices complaint, the General Counsel provided Sears with "sanitized" copies of advice and appeals memoranda from all closed cases, and made available the General Counsel's index to the advice memoranda in closed cases. The General Counsel made it clear that he was producing these documents only as a matter of grace, and that he

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[3] 5 U.S.C. §552(b)(5): "This section does not apply to matters that are . . . (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;"

[4] 5 U.S.C. §552(b)(7): "This section does not apply to matters that are . . . (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;"

did not consider himself to be obligated to furnish them to others. He also refused to give Sears copies of any documents which would explain the meaning of such phrases as the "circumstances of the case" (A. 169; A. 101; A. 107; Pet. App. C, p. 5a).

In the district court the General Counsel claimed that the advice and appeals memoranda were internal communications covered by exemption 5, and that the materials incorporated therein by reference were exempted from compelled disclosure by both exemptions 5 and 7. On August 10, 1972, the district court granted Sears' motion for summary judgment and denied the General Counsel's similar motion, holding that advice memoranda were instructions to staff and appeals memoranda were final agency opinions which must be disclosed pursuant to 5 U.S.C. §552(a)(2)(A) and (C) (Pet. App. C, p. 9a), and that in any event neither type of memoranda was within the scope of exemption 5 (*Id.*). The district court also ordered disclosure of documents expressly incorporated by reference, and of non-exempt documents indirectly incorporated by use of such phrases as the "circumstances of the cases," although the court also gave the General Counsel the alternative of producing explanatory material other than the incorporated documents. In addition, the Court allowed deletions of the names of affiants and settlement suggestions, if any, contained in the memoranda. Finally, the district court ordered the General Counsel to make available the indices required by 5 U.S.C. §552(a)(2) for advice and appeals memoranda compiled after July 4, 1967 (Pet. App. C, pp. 9a-10a). By this time the General Counsel had already made available the index for advice memoranda in closed cases and was in the process of compiling

one for appeals memoranda, albeit beginning only with August, 1971 (G.C. Br. D.C. 29 n.23).[5]

In the court of appeals the General Counsel again claimed the applicability of exception 5 to the advice and appeals memoranda, and exemptions 5 and 7 to the backup materials. But this time he also claimed that the request for backup materials incorporated by reference was not a request for "identifiable records" within the meaning of 5 U.S.C. §552(a)(3) (G.C. Br. D.C. 31). Nonetheless, the court of appeals affirmed on the basis of the district court's decision (Pet. App. A, p. 1a). A petition for rehearing was denied without opinion (Pet. App. B, p. 3a).

In his petition for a writ of certiorari, the General Counsel once again claimed that advice and appeals memoranda fell within exemption 5, but he also alleged for the first time since his original letter of denial (A. 19) that they, as well as the backup materials, were within the scope of exemption 7. Similarly, while he dropped his claim that some of the documents were not "identifiable," he raised for the first time the claim that all of the documents sought were covered by exemption 2: "matters. . . . related solely to the internal personnel rules and practices of an agency."

SUMMARY OF ARGUMENT

In urging affirmance of the decisions below, the Clearinghouse has focused on the General Counsel's withholding of advice and appeals memoranda, leaving largely to the parties the important, but tangential, issues concerning indexing requirements and disclosure of documents incorporated by reference.

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[5] "G.C. Br. D.C." refers to the principal Brief of the Appellant (General Counsel) in the Court of Appeals for the District of Columbia Circuit.

The special features of the Freedom of Information Act include requirements for mandatory disclosure of non-exempt information, permissive disclosure of exempt information, exhaustion of administrative remedies by a requesting party, and *de novo* court review with the burden of proof on the agency (*see* 5 U.S.C. §552(a)(3)). Implicit in the Act is a requirement that by the time a case reaches the district court, the agency will have claimed all of its defenses, and that the failure to do so will act as a waiver of non-claimed exemptions, at least where, as here, no law prohibits disclosure. The General Counsel failed to claim the applicability to advice and appeals memoranda of either 5 U.S.C. §552(b)(2) or 5 U.S.C. §552(b)(7) until he reached this Court. Since in the courts below, he claimed (b)(7) only as to the documents incorporated by reference, and he never claimed (b)(2) as to *any* of the documents, he should not now be allowed to rely upon those waivable defenses.

In attempting to justify secrecy during the pendency of an NLRB proceeding, the General Counsel has primarily relied upon exemption 5 of the Freedom of Information Act, which allows withholding of "inter-agency and intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. §552(b)(5). Since almost any document produced within the executive branch may be considered an inter- or intra-agency memoranda, a broad reading of the exemption would engulf the Act's liberal disclosure requirements and would make most of the other exemptions superfluous. To prevent such an occurrence, courts have recognized that the "available by law" exception limits the exemption to those documents which have been held not to be discoverable because of the doctrine of executive privilege. *Environmental Protection Agency v. Mink*, 410 U.S. 73, 85-86 (1973). Yet difficulties remain in applying the "rough analogies" of the discovery

rules to the Freedom of Information Act because Congress has determined that the need of an individual requester for the disputed records is irrelevant under this exemption. *Id.* at 86. Courts have thus had to consider the purposes behind both the Act and the exemption in an effort to insure the widest possible disclosure of useful information to the public without causing serious injury to the consultative functions of government which executive privilege is intended to protect.

We believe that Congress intended the focus to be on the proper scope of executive privilege in evaluating claims under the fifth exemption. Accordingly we deal first with the FOIA's legislative history in an attempt to discern Congress' understanding of the scope of the governmental privilege, and then with the discovery cases which have actually interpreted and applied that privilege. This analysis demonstrates that the privilege embodied in exemption 5 does not generally protect factual information and extends only to two types of advice: (1) recommendations, usually at a high level, regarding the making of policy (as opposed to a mere application of policy) and (2) legal opinions in the nature of a lawyer's work product. Moreover, agency opinions, policy statements, and instructions to staff do not fall within the scope of the privilege and, hence, are generally disclosable. Finally, in the third and fourth subsections, we discuss the leading cases which have interpreted exemption 5, and conclude that advice and appeals memoranda cannot be withheld under Congressionally mandated criteria.

ARGUMENT

I. NEITHER THE EXEMPTION 2 NOR THE EXEMPTION 7 ISSUES RAISED BY THE GENERAL COUNSEL ARE APPROPRIATE FOR SUPREME COURT CONSIDERATION IN VIEW OF THE SPECIAL CIRCUMSTANCES OF THIS CASE.

Under the statutory scheme created by Congress for review of Freedom of Information Act requests, an agency should not be permitted to raise a new defense for the first time at the appellate court level — certainly not at the Supreme Court level — as the General Counsel has sought to do with regard to his exemption 2 claim. Similarly, this Court should refuse to rule upon the General Counsel's exemption 7 defense because it was not raised in the courts below as to the advice and appeals memoranda, although it was argued regarding documents incorporated therein by reference.[6]

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[6] We also point out that proposed amendments to the FOIA, including exemption 7, are pending in Congress. *See* Conference Report, H. Rep. No. 93-1380, 93d Cong., 2d Sess. (1974). If enacted, the government's claim under exemption 7 will no longer be a question worthy of certiorari even as to the material incorporated by reference because Congress' specifically expressed intent in amending exemption 7 is to "disapprov[e]" (H. Rep. No. 93-1380, *supra*, at 2) the very cases relied upon by the General Counsel in his Supreme Court brief. *Compare* Pet. Br. 32 *with* 120 Cong. Rec. S 9336 (daily ed., May 30, 1974). In doing so, the House-Senate Conference Committee explicitly stated:

> Nor is this exemption [7] intended to include records falling within the scope of subsection 552(a)(2) of the Freedom of Information law, such as administrative staff manuals and instructions to staff that affect a member of the public. [H. Rep. No. 93-1380, *supra*, at 12-13 (1974)]

(continued)

In June of 1971, Sears requested access to the advice and appeals memoranda which are the subject of this litigation. Both its initial request and its administrative appeal were denied on the bases of exemptions 5 and 7 of the Freedom of Information Act (A. 19, 24-28, 29-31; Pet. Br. 10). In the district court, exemptions 5 and 7 were the only defenses raised, and the latter exemption was argued only as to certain backup materials. Both issues were decided adversely to the agency.

In the court of appeals, the General Counsel again relied upon exemptions 5 and 7, but he also attempted to raise for the first time the defense that the documents incorporated by reference into the advice and appeals memoranda, and ordered to be disclosed by the district court, were not "identifiable records" within the meaning of section 552(a)(3) (G.C. Br. D.C. 31). Since the court of appeals affirmed the judgment on the basis of the opinion of the district court (Pet. App. A, pp. 1a-2a), which had not considered the identifiable records question because it had not been argued, it appears that the court of appeals refused to consider the belatedly raised identifiable records issue. In any event, the General Counsel has abandoned that attempt to rationalize his withholding, but now, in this Court, he seeks for the first time to raise two new defenses. He rather apologetically states that another "review of the case" (Pet. Br. 36) indicates that advice and

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[6] (continued) While the President has vetoed the proposed amendments, neither his veto message nor the alternative language which he has transmitted to the Congress would change the proposed amendments to exemption 7 as they are relevant to this case. The Congress has yet to vote on a possible veto override, and the President has in any event urged the Congress to reenact the new amendments during this Session with his suggested changes to exemption one, and the provisions dealing with costs and time limits in responding to requests.

appeals memoranda are "related *solely* to the internal *personnel* rules and practices of an agency" (5 U.S.C. §552(b)(2) (emphasis added)).[7] Furthermore, he claims that the advice and appeals memoranda are protected by the investigatory files exemption (5 U.S.C. §552(b)(7)), without even acknowledging that the issue was never raised below, where he had asserted exemption 7's applicability only as to backup documents incorporated by reference.[8]

The regulations of most Federal agencies, require a requester to make both an initial and appellate request before going to court. *E.g.*, Justice, 28 C.F.R. §16.7; Labor, 29 C.F.R. §70.50; Renegotiation Board, 32 C.F.R. §1480. 7(e). *See* 5 U.S.C. §552(a)(3); *Aviation Consumer Action Project v. CAB*, 370 F. Supp. 945 (D.D.C. 1972). The requirement that a requester exhaust his administrative remedies is intended to give the agency an opportunity to fully consider a request and to focus the legal issues. The administrative procedure is, however, a two way street. Just as a requester cannot expand the scope of his request after going to court, an agency should not be allowed to use its administrative procedure as a device for exhausting the requester by claiming one set of exemptions at the administrative level, only to change its defenses at each successive level of court review.

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[7] The General Counsel did acknowledge that "some" lower courts — citing the Fifth and Sixth Circuits, as well as the district court for the District of Columbia (Pet. Br. 39) — have held that the Senate Report correctly states that exemption 2 protects only documents concerned solely with an agency's relations with its employees. *See* S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965). *Contra* H. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966).

[8] Also noteworthy is the fact that the General Counsel argues in this Court that the "except" clause to exemption 7 was not intended to allow a plaintiff access to documents which would be available in discovery (Pet. Br. 34), while he argued exactly the opposite view before the Court of Appeals (G.C. Br. D.C. 33).. *See* Petition For A Writ of Certiorari 13.

This conclusion is supported by the statutory scheme since the exemptions from mandatory disclosure are permissive only,[9] and may be waived, unless there is an executive order (*see* exemption 1) or a statute (*see* exemption 3) which *prohibits* disclosure.[10] Allowing an agency to claim one exemption at the administrative level and to argue additional exemptions at the district court level will dilute the administrative review process, and spawn litigation by encouraging a superficial review process. The requester, who does not know the actual contents of a document, may rightly realize that the exemption claimed is inapplicable and thus commence litigation, even though he may not have gone to court had the agency taken the time to properly review the requested documents, claimed all the exemptions which were really applicable, and explained the justification for applying them.

In any event, there is no justification for allowing an agency to raise new, waivable, issues on appeal. To do so is inconsistent with the statutory mandate and would defeat the Congressional policy underlying the Act. *See Duignan v.*

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[9] *E.g.*, Sears, Roebuck and Co. v. GSA, Civ. No. 2146-73, slip op. 4 (D.D.C., Sept. 6, 1974). *See, e.g.*, S. Rep. No. 93-854, 93d Cong., 2d Sess. 6 (1974); S. Rep. No. 813, 89th Cong., 1st Sess. 10 (1965); 112 Cong. Rec. 13007 (1966); K. Davis, *Administrative Law Treatise* §3A.5 (Supp. 1970).

[10] In accordance with the suggestion in the Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 2-3 (1967), many agencies have by regulation expressly adopted the position that, notwithstanding applicability of an FOIA exemption, records must be disclosed when to do so is in the public interest. *E.g.*, State, 22 C.F.R. §6.5(b); HUD, 24 C.F.R. §15.21; Labor, 29 C.F.R. §70.22(b); Interior, 43 C.F.R. §22; HEW, 45 C.F.R. §5.70; DOT, 49 C.F.R. §7.51. At least one court of appeals has approvingly cited the Labor Department's regulation curbing the scope of the FOIA exemptions. *Secretary of Labor v. Farino*, 490 F.2d 885, 893 (7th Cir. 1973).

United States, 274 U.S. 195, 200 (1927); *Shokuwan Shimabukuro v. Higeyoshi*, 78 U.S. App. D.C. 271, 273, 140 F.2d 13, 15 (1944); *Stanley v. United States*, 245 F.2d 427, 435 (6th Cir. 1957); *see also Ladrey v. Commission On Licensure To Practice The Healing Art*, 104 U.S. App. D.C. 239, 242, 261 F.2d 68, 71 (en banc), *cert. denied*, 358 U.S. 920 (1958). Accordingly, the Court should neither consider the General Counsel's belatedly raised exemption 2 defense nor, with regard to the advice and appeals memoranda, the claimed exemption 7 defense.

II. ADVICE AND APPEALS MEMORANDA ARE NOT WITHIN THE SCOPE OF EXEMPTION 5.

A. The Legislative History Demonstrates that Exemption 5 Protects only Legal and Policy Deliberations whose Premature Disclosure Would Impede the Consultative Functions of Government, and not Agency Decisions or Directives.

In explaining the purpose of exemption 5, the House Report on the FOIA declares that "any internal memorandums which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public." H. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966).[11] Fortunately, the

[11] The use in the House Report of the limiting phrase "routinely be disclosed" has been criticized as an attempt to expand the scope of the exemption contrary to the words of the statute which would seemingly require disclosure whenever any hypothetical party under some, possibly special, circumstances could gain access through discovery. Benson v. General Services Administration, 289 F. Supp. 590, 595 (W.D. Wash. 1968), *aff'd*, 415 F.2d 878 (9th Cir. 1969). *See* Environmental Protection Agency v. Mink, *supra*, 410 U.S. at 85-86. *Contra* Sterling Drug, Inc. v. FTC, 146 U.S. App. D.C. 237,

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legislative history of exemption 5 contains considerably more material explaining what Congress perceived to be the privilege's usual limits, and hence the limits of exemption 5. This history demonstrates, we submit, that the fifth exemption was intended to protect only legal and policy deliberations whose premature disclosure would impede the consultative functions of government, and that Congress never intended to allow withholding of agency opinions, interpretations or instructions to staff which affect members of the public. *See* S. Rep. No. 813, 89th Cong., 1st Sess. 6-7, 9 (1965); H. Rep. 1497, *supra*, at 7, 10.

Exemption 5 apparently originated in section 3(c) of S. 1666, 88th Cong., 2d Sess. (1964), which exempted:

> the internal memorandums of the members and employees of an agency relating to the consideration and disposition of adjudicatory and rule-making matters. [110 Cong. Rec. 17086 (July 28, 1974)].

At the Senate hearings executive officials urged that the exemption for policy deliberations should not be limited to adjudicatory and rule-making matters.[12] Consequently, when the Senate bill was reported, it expanded the exemption to cover:

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11 (continued) 243-44, 450 F.2d 698, 704-05 (1971). We do not think it necessary for this Court to decide this issue since, as demonstrated in the following pages, the documents sought in this action do not fall within the scope of the executive's privilege, and so they should be "routinely" made available in discovery. *See generally* K. Davis, Administrative Law Treatise §3A.21, pp. 157-58 (Supp. 1970).

12 *E.g.*, Hearings on S. 1666 and S. 1663 Before the Subcomm. on Adm. Practice and Proc. of the Senate Judiciary Comm., 88th Cong., 1st Sess. 202-03, 247 (1963).

> intra-agency or inter-agency memorandums or letters dealing solely with matters of law or policy [S. 1666, §2(c)(5), *id.*]

The Committee Report explained that:

> . . . there are certain governmental processes relating to legal and policy matters which cannot be carried out . . . "in a fish bowl" [but]
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> * * *
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> All *factual* material in Government records is to be made available to the public, as well as *final* agency determinations on legal and policy matters which affect the public. [S. Rep. No. 1219, 88th Cong., 2d Sess. 11 & 7 (1964) (Emphasis in original)]

On the Senate floor Senator Humphrey suggested to Senator Long, a leading proponent of the FOIA, that the section be amended to exempt "intra-agency or inter-agency memorandums or letters dealing with matters of fact, law or policy." He argued:

> As presently written clause (5) of the amended Section 3(c) appears not to exempt intra-agency or interagency [sic] memorandums or letters dealing with matters of fact. For example, clause (5) would apparently not exempt memorandums prepared by agency employees for themselves or their superiors purporting to give their evaluation of the credibility of evidence obtained from witnesses or other sources. The knowledge that their views might be made public information would interfere with the freedom of judgment of agency

> employees and color their views accordingly. Memorandums summarizing facts used as a basis for recommendations for agency action would likewise appear to be excluded from the exemption contained in clause (5) [110 Cong. Rec. 17667 (July 31, 1964)].

Senator Long responded that the suggested amendment was overbroad and unnecessary for the purpose suggested by Senator Humphrey:

> The suggestion with respect to exception (5), adding "matters of fact" to "matters of law or policy" would result in a great lessening of the information available to the public and to the press. Furthermore, the example cited with respect to intra-agency memorandums giving evidence of the credibility of evidence obtained from witnesses or other sources, leads me to point out that there is nothing in this bill which would override normal privileges dealing with the work product and other memorandums summarizing facts used as a basis for recommendations for agency action if those facts were otherwise available to the public. [*Id.* at 17667-68].

With that explanation, the Senate passed the bill without change (110 Cong. Rec. 17668). That bill did not become the law because the House did not act upon the legislation during the 88th Congress.

When S. 1160, the bill which ultimately became the Freedom of Information Act, was introduced in the 89th Congress, it contained the same exemption 5 passed by the Senate in the 88th Congress.[13] During the course of Senate

[13] Hearings on S. 1160, S. 1336, S. 1758 and S. 1879 Before the Subcomm. on Adm. Practice and Proc. of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess. 7 (1965).

hearings, several agencies expressed apprehension that the language of exemption 5, limiting it to memoranda dealing "solely" with matters of law or policy, would require disclosure of entire documents, including legal and policy recommendations whenever the documents contained any factual information.[14] Thus, to clarify its intention, the Senate substituted the language — "which would not be available by law to a private party in litigation with the agency" — for the wording: "dealing solely with matters of law or policy." S Rep. No. 813, *supra*, 1.[15] The Senate Committee explained (*Id.* at 2 & 9):

> The purpose of clause (5) is to protect from disclosure only those agency memorandums and letters which would not be subject to discovery by a private party in litigation with the agency. This would include the working papers of the agency attorney and documents which would come within the attorney-client privilege if applied to private parties.
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[14] *See, e.g.*, Hearings on S. 1160, *supra*, at 46 (Treasury Department); *id.* at 236-37 (ICC); *id.* at 266 (NLRB); *id.* at 406-07 (Department of Commerce); *id.* at 417 (Department of Defense); *id.* at 446 (FAA); *id.* at 450 (FCC).

[15] S. 1160 as enacted defined "private party" as "any party other than an agency." Pub. L. 89-487, §3(g), 80 Stat. 251. When the statute was codified, the definition was incorporated into the exemption (Pub. L. 90-23, 81 Stat. 54), giving 5 U.S.C. §552(b)(5) its present wording: "[memorandum] . . . which would not be available by law to a party other than an agency in litigation with the agency." The codification made no substantive change in the FOIA. *E.g.*, H. Rep. No. 125, 90th Cong., 1st Sess. 1 (1967).

> It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to "operate in a fishbowl." The committee is convinced of this general proposition, but it has attempted to delimit the exception as narrowly as consistent with efficient Government operation.

The history of the legislation follows the same pattern in the House. The bills introduced into the 89th Congress exempted only materials "dealing solely with matters of law or policy."[16] Several executive agencies complained that this language would force disclosure of law and policy recommendations along with factual information.[17] The House Committee subsequently reported out Senate bill 1160, including the amended exemption 5 (H. Rep. No. 1497, *supra*, at 10), and the bill was swiftly enacted into law.

While the legislative history of exemption 5 does not conclusively answer all questions regarding Congressional intent, it does significantly flesh out the meaning of the words. Congress' intention was to protect executive agencies from being "prematurely forced"[18] to disclose documents

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16 Hearings on H.R. 5012-21, 5237, 5406, 5526, 5583, 6172, 6739, 7010, and 7161 Before the Subcomm. of the House Comm. on Govt. Operations, 89th Cong., 1st Sess. 3 (1965).

17 *See, e.g., id.* at 208 (Bureau of Budget); *id.* at 220 (Department of Defense).

18 S. Rep. No. 813, *supra*, at 9 (p. 18, *supra*).

regarding "certain . . . legal and policy matters,"[19] such as (a) memoranda "relating to the consideration and disposition of adjudicatory and rule-making matters,"[20] including those "summarizing facts used as a basis for recommendations for agency action if those facts were otherwise available to the public,"[21] and (b) "the working papers of the agency attorney and documents which would come within the attorney-client privilege if applied to private parties."[22] Conversely, Congress sought generally to insure disclosure of certain internal documents such as "factual material"[23] and "final agency determinations on legal and policy matters which affect the public"[24] by excluding them from the coverage of the exemption. Finally, the legislative history indicates that the exemption should be interpreted just "as narrowly as [is] consistent with efficient Government operation."[25]

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[19] S. Rep. No. 1219, *supra*, at 11 (p. 15, *supra*). *See* S. Rep. No. 813, *supra* at 9 (p. 18, *supra*).

[20] S. 1666, *supra*, 110 Cong. Rec. 17086 (p. 14, *supra*).

[21] 110 Cong. Rec. 17667-68 (p. 16, *supra*).

[22] S. Rep. No. 813, *supra*, at 2 (p. 17, *supra*). *See* 110 Cong. Rec. 17667-68 (p. 16, *supra*).

[23] S. Rep. No. 1219, *supra*, at 7 (p. 15, *supra*).

[24] *Id.*

[25] S. Rep. No. 813 (p. 18, *supra*). *See* H. Rep. No. 1497, *supra*, at 10.

B. The Government's Discovery Privilege Protects Only Certain Legal and Policymaking Deliberations.

The language of exemption 5, as interpreted by this Court, "clearly contemplates that the public is entitled to all such memoranda or letters that a private party may discover in litigation with the agency." *Environmental Protection Agency v. Mink, supra,* 410 U.S. at 85-86. Under Federal Rules of Civil Procedure 26 and 34, which are to be liberally construed, a private party is entitled to access to all relevant documents, subject only to claims of evidentiary privilege, and the United States is bound by the Federal Rules of Civil Procedure just as any other litigant. *E.g., NAACP v. Hodgson,* 57 F.R.D. 81, 83 (D.D.C. 1972).

The General Counsel has asserted that his directives and instructions would not and should not be available in discovery (Pet. Br. 21), but the General Counsel does not appear to have analyzed the origin and purpose of the asserted governmental discovery privilege. Private organizations enjoy no general evidentiary privilege protecting their internal communications from discovery. *See, e.g., Kaiser Aluminum & Chemical Co. v. United States,* 157 F. Supp. 939, 944 (Ct. Cl. 1958) (Reed, J.). Any special privilege of the executive branch results from the constitutional and common law doctrine of executive privilege. Since its constitutional elements are apparently limited to communications involving the President,[26] which are not at issue here, we need concern ourselves with only its common

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[26] Nixon v. United States, ___ U.S. ___, 94 S.Ct. 3090, 3106-07 (1974). Communications involving judges and their law clerks or legislators and their aides apparently enjoy similar constitutional protection.

law elements which Congress has embodied in the Freedom of Information Act.[27] We are not dealing here with the executive privileges protecting national security information[28] or informants' identities,[29] but only with a general claim that internal communications must be protected.

The doctrine of executive privilege for internal communications has historically been recognized to protect the "secrets of the cabinet." *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) (Marshall, C.J.). This privilege for high-level policymaking deliberations has been held to include deliberations of decisionmakers in adjudicatory and rule-making proceedings because such proceedings have "a quality resembling that of a judicial proceeding." *United States v. Morgan*, 313 U.S. 409, 422 (1941), *quoting* 298 U.S. 468, 480 (1936). In a much quoted passage from the *Morgan* case, this Court disapproved an order allowing the taking of the Secretary of Agriculture's deposition by

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[27] Ethyl Corp. v. Environmental Protection Agency, 478 F.2d 47, 52 (4th Cir. 1973); Philadelphia Newspapers, Inc. v. HUD, 343 F. Supp. 1176, 1178 (E.D. Pa. 1972); Committee on Civil Rts. of the Assoc. of the Bar of the City of New York, Executive Privilege: Analysis and Recommendations for Congressional Legislation 6-7 (1973); *see* Cooney v. Sun Shipbuilding & Drydock Co., 288 F. Supp. 708, 712 (E.D. Pa. 1968).

[28] *Compare* United States v. Reynolds, 345 U.S. 1 (1953) (national security privilege in discovery) *with* Environmental Protection Agency v. Mink, 410 U.S. 73 (1973) (protected by exemption 1 of FOIA).

[29] *Compare* Roviaro v. United States, 353 U.S. 53 (1957) (informer privilege in discovery) *with* Evans v. Department of Transportation, 446 F.2d 821 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972) (informant's identity protected by exemption 7 of FOIA).

declaring that "it was not the function of the court to probe the mental processes of the Secretary." *United States v. Morgan, supra,* 313 U.S. at 422, *quoting* 304 U.S. 1, 18 (1938). *But see Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 419-21 (1971).

The recent prominence of the policymaking privilege can be traced to a 1958 opinion of Mr. Justice Reed, sitting by designation, in *Kaiser Aluminum & Chemical Co. v. United States,* 157 F. Supp. 939 (Ct. Cl. 1958), in which the term "executive privilege" was apparently used for the first time in a judicial opinion.[30] The document sought there was an advisory opinion prepared for the Liquidator of War Assets by a "confidential assistant" containing "advice on program policy" with regard to a proposed sale of aluminum plants. *Id.* at 943. The court, after making it clear that it was not dealing with the "primary facts upon which conclusions are based," allowed certain expressions of opinion to be withheld in order to protect the making of "governmental policy." *Id.* at 947. The court reasoned that disclosure would be "injurious to the consultative functions of government" because it would inhibit "open, frank discussion between subordinate and chief," and would, in

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30 The year 1958 is also significant because prior to that year most government privilege cases were grounded on the government's alleged authority to withhold documents under the so-called "Housekeeping Statute," 5 U.S.C. §301 (1970) [formerly 5 U.S.C. §22]. In 1958 Congress amended that statute to make it clear that it does not authorize withholding of information from the public. Pub. L. 85-619, 72 Stat. 547 (Aug. 12, 1958). Thus, while some courts have continued to cite pre-1958 precedents without considering either the effect of the 1958 amendment or the legitimate scope of the executive privilege, the trend is to reconsider the scope of the privilege in view of its purposes. *See* Cooney v. Sun Shipbuilding & Drydock Co., 288 F. Supp. 708, 713-14 (E.D. Pa. 1968) (for discussion and citation of cases).

effect, allow a party "to probe the mental processes" of the administrator in reaching his conclusions. *Id.* at 946. The *Kaiser* case has been widely followed in cases concerning the government's privilege regarding policymaking deliberations,[31] and factual and investigative matters have been generally found to be disclosable even if other portions were not.[32]

A second, closely related, element of the internal communications privilege is the protection of the government attorney's work product, and deliberations which, if in the private sector, would fall within the attorney-client privilege. In fact, Justice Reed analogized the policymaking privilege recognized in *Kaiser* to the attorney-client privilege. 157 F. Supp. at 946-47. Courts have determined that intra-agency communications concerning litigation strategy are sufficiently analogous to the attorney-client communications to necessitate protection.[33] Similarly, "[t]he

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31 *See, e.g.,* Boeing Airplane Co. v. Coggeshall, 108 U.S. App. D.C. 106, 280 F.2d 654 (1960) (policy recommendations made to Renegotiation Board); O'Keefe v. Boeing Co., 38 F.R.D. 324 (S.D. N.Y. 1965) (recommendations as to Air Force policy); Walled Lake Door Co. v. United States, 31 F.R.D. 258 (E.D. Mich. 1962) (memoranda and reports pertaining to decision of the Interstate Commerce Commission).

32 *See, e.g.,* Machin v. Zuckert, 114 U.S. App. D.C. 335, 316 F.2d 336, *cert. denied,* 375 U.S. 896 (1963); Boeing Airplane Co. v. Coggeshall, 108 U.S. App. D.C. 106, 112-13, 280 F.2d 654, 660-61 (1960); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 327 (D.D.C. 1966), *aff'd,* 128 U.S. App. D.C. 10, 384 F.2d 979, *cert. denied,* 389 U.S. 952 (1957).

33 Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, *supra,* 40 F.R.D. at 323-25. *See, e.g.,* Zacher v. United States, 227 F.2d 219, 226 (8th Cir. 1955), *cert. denied,* 350 U.S. 993 (1956) (recommendations to Attorney General regarding litigation decision); Clark

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work products of government attorneys are no less protected than those of private attorneys."[34]

With regard to the issue of whether agency policy statements and directives are discoverable, one commentator has pointedly stated that "there are no Rule 26 cases directly on the question," but has argued that "a number of considerations directly support the requirement that an agency disclose the 'working law' which it follows in the disposition of individual cases." Note, *The Freedom of Information Act and the Exemption for Intra-Agency Memoranda*, 86 Harv. L. Rev. 1047, 1058 (1973). Likewise, the Ninth Circuit has stated that Rule 26 cases denying discovery of advisory opinions can be distinguished as not involving recommendations adopted as policy. *GSA v. Benson*, 415 F.2d 878, 881 (1969), *aff'g* 289 F. Supp. 590 (W.D. Wash. 1968).

However, the General Counsel has relied upon considered dictum in *Davis v. Braswell Motor Freight Lines*, 363 F.2d 600 (5th Cir. 1966), a case which antedates the effective date of the Freedom of Information Act. The appellate

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33 (continued) v. Pearson, 238 F.Supp. 495, 496 (D.D.C. 1965) (advisory recommendations as to Justice Department action); United States v. Six Lots of Ground, 27 Fed. Cas. 1097 (C.C. La. 1872) (No. 16,299) (correspondence between Attorney General and district attorney as to dismissing a writ of error).

34 Thill Securities Corp. v. New York Stock Exchange, 57 F.R.D. 133, 138 (E.D. Wis. 1972); *cf.* Hickman v. Taylor, 329 U.S. 495 (1947). Upon a showing of "substantial need" and "undue hardship" a litigant can discover the materials prepared by an adversary's attorney in preparation for trial, except for the attorney's "mental impressions, conclusions, opinions, or legal theories." F.R. Civ. P. 26(b)(3).

court there held that the trial court should have quashed a subpoena for advice memoranda — appeals memoranda were not involved — because the subpoena had been issued to the Regional Director rather than the head of the agency, the General Counsel, as agency regulations required. The court then considered whether, under a proper subpoena to a non-party agency,[35] the advice memoranda would be subject to discovery, answering in the negative, by stating that:

> The asserted purpose of the subpoena was to uncover evidence concerning the Board's findings or determinations, whether preliminary, temporary or final, on the status of the unions as representatives of the employees of Braswell. *Under the circumstances in this case,* we conclude that this objective cannot be satisfied in this manner and that, therefore, the subpoena should have been quashed. [*Id.* at 603 (emphasis added)].

The court then quoted broad language from the *Kaiser* and *Morgan* cases, concluding that there was a "qualified privilege which, in the absence of special circumstances, shields it from examination by the public." 363 F.2d at 604-05 (footnote omitted). To the extent that *Davis* deals with preliminary recommendations, it is correct. But to the extent that it deals with final agency decisions, it is, we submit, in error. *Morgan* and *Kaiser*,

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[35] Since exemption 5 allows withholding only of information which would not be available in discovery "with the agency," it is important to keep in mind that "[t]he government is subject to broader discovery in actions brought by or against it than in those in which it is not a party." 4 J. Moore and J. Lucas, Federal Practice ¶26.60[6], at 26-25 (2d ed. 1974) (and cases cited therein).

relied upon by the *Davis* court, did not deal with the question of adopted policy, and the *Davis* court's error resulted from its failure to focus on that distinction.

One district court has, however, recently addressed the agency law issue with regard to certain IRS internal memoranda, concluding that "instructions to staff, and general policy statements or interpretations by the IRS affecting members of the public on the specific issue of depreciation" had to be made available in discovery. *Robins & Wells, Inc. v. United States*, 63 F.R.D. 73, 76-77 (M.D.N.C. 1974). While the court held that private letter rulings and technical advice memoranda did not have to be made available in that case because the plaintiff had failed both to demonstrate their relevancy or materiality and to describe the requested documents with reasonable particularity, it did not say that they were privileged. *Id.* at 77. In fact, in a Freedom of Information Act context, these IRS documents have been found to be agency law, which must be disclosed unless some exemption other than (b)(5) is found to be applicable. *Tax Analysts and Advocates v. IRS*, No. 73-1978 (D.C. Cir., Aug. 19, 1974), *aff'g in part, rev'g in part*, 362 F. Supp. 1298 (D.D.C. 1973).

The validity of the determination that relevant statements of agency policy, interpretations, and instructions to staff adopted by the agency should generally be available in discovery is supported by consideration of the reasons for the executive's qualified privilege for internal communications. As the foregoing discussion revealed, the privilege is intended to protect the free and frank flow of opinions when policy-making officials must consult with subordinates for advice. Disclosure of such information might in some instances unduly subject subordinates to harsh criticism which should rightly be aimed only at officials ultimately

responsible for agency decisions, and, conversely, disclosure of agency working papers may actually mislead rather than help the public because of their preliminary and changeable character. *See, e.g., Sterling Drug, Inc. v. F.T.C.*, 146 U.S. App. D.C. 144, 152, 448 F.2d 698, 706 (1971).

This balance, however, changes significantly when one considers policy, interpretations, or instructions to staff which have already been adopted by the agency. Disclosure of adopted policy should not inhibit agency discussion because: (1) a staff member's career rewards from having his recommendation adopted far outweigh any possible detriment from resulting public criticism; and (2) criticism for adopted policy will be aimed at the "agency," not individual staff members. On the other hand, the public's need for access to adopted agency policy is acute. In ignorance of (or with unequal access to) such policy statements, which are available only from the agency, parties cannot intelligently frame their arguments. Additionally, public criticism of agency policy, as opposed to intra-agency recommendations, and of inconsistent agency application of such policy, should be encouraged.

This analysis demonstrates that the executive's internal communications exemption applies only to advice and recommendations given on certain legal or policymaking matters. It includes adjudicatory and rulemaking decisions — one cannot probe the decisionmaker's mind — and it includes attorney-client and attorney work product information. The privilege is intended to protect the deliberative process whereby (sometimes controversial) policy is formulated: it is not intended to protect policy decisions already made.

C. Advice and Appeals Memoranda Are Agency Law Which Must Be Disclosed.

Having thus concluded that final agency determinations on legal and policy matters which affect the public must be disclosed, we next consider whether advice and appeals memoranda fit that description. Only if they do not fit that description is it necessary to independently consider whether, even though they are internal memoranda under exemption 5, they should nevertheless be disclosed on the ground that their production would not be "injurious to the consultative function of government that the privilege of non-disclosure protects." *Environmental Protection Agency v. Mink, supra*, 410 U.S. at 87, *quoting Kaiser Aluminum & Chemical Corp.*, 157 F. Supp. 939, 946 (Ct. Cl. 1958).[36]

In section 552(a)(2), Congress delineated three somewhat overlapping categories of agency law which are not protected by exemption 5:[37]

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[36] We thus respectfully suggest that if, in the tandem case, *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, No. 73-1316, respondent Grumman is correct in its argument that the documents it seeks are agency opinions (and we agree that it is correct), then there is no reason to ask whether they are nonetheless within exemption 5 (Brief for Respondent 20), because Congress has excluded all agency opinions from the coverage of exemption 5.

[37] The General Counsel conceded below that in the performance of his pre-complaint prosecutorial authority, he, or more correctly the Office of the General Counsel, is an agency within the meaning of 5 U.S.C. §551(1) (Pet. App. C, p. 6a n.4). We do not understand him to dispute that fact at this late stage. In any event, that fact seems indisputable: in making the final decision as to whether or not a complainant can gain access to the NLRB, the General Counsel acts as an "authority" of the Government and is therefore, an "agency." (continued)

> (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
>
> (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;[38] and
>
> (C) administrative staff manuals and instructions to staff that affect a member of the public.

Both Judge Corcoran in the district court, and Judges Miller, Wright and Robb in the Court of Appeals, held that advice memoranda were mandatory "instructions to staff" and that appeals memoranda were "final opinions" in the adjudication of cases. We think that these determinations are supported by the record, and that, in any event, the advice and appeals memoranda are "statements of policy and interpretations which have been adopted by the agency [the Office of the General Counsel]."

Much of the General Counsel's contrary argument is no more than a war of semantics: another in the legion of cases in which we have been involved where "lawyer's

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37 (continued) 5 U.S.C. §551(1). *See* Washington Research Project, Inc. v. HEW, No. 74-1027, slip op. 11-17 (D.C. Cir., Sept. 12, 1974); Soucie v. David, 145 U.S. App. D.C. 144, 448 F.2d 1067 (1971).

38 The FOIA also requires publication in the Federal Register of "statements of *general* policy or interpretations of *general* applicability formulated and adopted by the agency." 5 U.S.C. §552(a)(1)(D) (emphasis added). Thus section 552(a)(2)(B), quoted in the text, concerns only policy statements and interpretations of limited or specific applicability.

verbiage" given in affidavit form has transformed insignificant differences into major bones of contention. *See, e.g., Ditlow v. Volpe,* 362 F. Supp. 1321 (D.D.C. 1973), *rev'd as to a different issue,* ___ U. S. App. D.C. ___, 494 F.2d 1073, *cert. denied,* 43 U.S.L.W. 3256 (Oct. 29, 1974) (No. 73-1780). For example, the General Counsel claims on the one hand that advice and appeals memoranda are "not used or cited as precedents" (Pet. Br. 6), while on the other hand he states that all questions presenting "novel or complex problems" are required to be submitted to the General Counsel's Division of Advice so that a uniform policy can be created throughout the country (Pet. Br. 4). How a uniform policy can be created without the use of precedent is difficult to fathom. Moreover, if they are not used as precedent, it is mystifying why the Division of Advice bothers to either index its memoranda (Pet. Br. 6 n.5) or to refer to prior memoranda in later cases (Pet. Br. 5).

Similarly, the General Counsel says that he has delegated to Regional Directors only the initial power to decide whether to issue complaints (Pet. Br. 3), yet he claims that the "ultimate decision" on whether to file the complaint lies with the Regional Director (Pet. Br. 6). Moreover, he has been able to cite no case in which Regional Directors did not take the action directed in "advice" memoranda (Pet. Br. 6). Finally, the General Counsel's assertion — that in some cases where a memorandum directs the issuance of a complaint, the memorandum "may" discuss settlements (Pet. Br. 5) — is both irrelevant, since the courts below said that such information could be deleted (Pet. App. C, pp. 9a, 10a), and circumspect, since the General Counsel, who now makes all of these memoranda public at the end of a proceeding (Pet. Br. 10 n.12),

was not able in the district court to cite even one example containing settlement advice.

1. Appeals Memoranda Are "Final Opinions" or "Orders," "Made In The Adjudication Of Cases"

Neither the House nor the Senate Reports lend much light to the meaning of subsection (a)(2). The Senate Report repeats the statutory language (S. Rep. 813, *supra*, at 6-7), and the House Report's elaboration is that: "the bureaucracy has developed its own form of case law. This law is embodied in the thousands of orders, opinions, statements, and instructions issued by hundreds of agencies. This is the material which would be made available under subsection (b) of S. 1160." H. Rep. No. 1497, *supra*, at 7.

With this background, we must consider the words of the Act – "opinions," "order," and "adjudication." As has been explained by Professor Davis, these are much broader concepts under the Administrative Procedure Act (APA) than one not familiar with it might suppose. K. Davis, Administrative Law Treatise §3A.8, at 128 (Supp. 1970). "'Order' means the whole or any part of a final disposition . . . of any agency in any matter other than rulemaking but including licensing," 5 U.S.C. §551(6), and "'adjudication' means agency process for the formulation of an order." 5 U.S.C. §551(7). An "opinion" is, of course, an explanation of, or justification for, an order. Thus, under the applicable APA definitions, every order is issued as part of the final disposition, affirmative or negative, of an adjudication. Therefore, since advice and appeals memoranda are final dispositions of the agency's duty to determine whether a complainant may have access to the NLRB process, they are orders and opinions in the adjudication of cases.

The General Counsel's contrary claim is dependent upon significant omissions and the use of words with double meanings. He asserts that:

> An appeal memorandum is not the "final disposition" by the agency of the unfair labor practice complaint, since, in sustaining the appeal, the General Counsel has directed that a complaint be filed and the adjudicatory process begin. [Pet. Br. 45 n.33].

In the first place, this statement is dependent upon reading the word "agency" to mean the NLRB, omitting the fact that the Office of the General Counsel is itself an agency. Second, even reading agency to mean NLRB, the decision *not* to file a complaint is certainly a "final disposition" cutting off all access to the Board's processes.[39]

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[39] In fact, from the public's standpoint those advice memoranda which instruct the regional director *not* to issue a complaint may be the most important of all the documents sought, especially since appeals memoranda are no longer written in cases affirming a decision not to file a complaint (A. 94-95; Pet. Br. 7). Certainly, absent an appeal to the General Counsel, an advice memorandum is the final disposition of the case. In fact, while a charging party may as a general rule stand about a 1 in 20 chance of securing a reversal by the General Counsel on appeal (Op. App. A 15), his chances are, despite the apparent success of Sears in this particular case, a great deal slimmer where the Division of Advice has already decided that no complaint should issue, especially since the General Counsel or an immediate subordinate participates in the decisions in both advice and appeals cases. Most certainly, an advice memorandum which orders the dismissal of a case does not contain settlement strategies or the like since there is nothing to settle. While in a case where a complaint is filed, the public may eventually be able to discern the reasons for the General Counsel's decision from his presentation before the Board, no such

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Conversely, the decision to file a complaint is the final disposition of the issue of whether the Board's processes shall be available to a complainant. Finally, the General Counsel's reasoning is circular in that he says that an appeal memorandum is not a final disposition because the adjudicatory process has not begun, whereas the question of whether the adjudicatory process has begun hinges on whether the General Counsel's action is a "final disposition."

The General Counsel's appeals memoranda are orders, and opinions explaining those orders, made in the adjudication of cases which have far too long been cloaked in secrecy. As the General Counsel himself admits, their disclosure "produces a better informed labor bar and public and affords me the opportunity to receive comments on my action." (Pet. Br. 46 n.34, *quoting* A. 150).

2. Advice And Appeals Memoranda Are Statements Of Policy And Interpretations Which Have Been Adopted By The Agency.

Subsection (a)(2)(B) — "those statements of policy and interpretations which have been adopted by the agency" — on its face is the broadest and clearest of the categories of agency law which must be made available to the public. Policy statements or interpretations are not limited to those

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39 (continued) opportunity ever occurs when a complaint is not filed. Further, when the Washington Office decides a novel question, it creates a new national policy of which the public should be apprised. It is no answer to say that, under the pressure of this litigation, the General Counsel has begun to make available advice and appeals memoranda in closed cases (*see* Pet. Br. 10 n.12) because, if this was merely a discretionary decision, a less benevolent General Counsel might in the future reverse that policy on the ground, for example, of administrative convenience.

made in adjudication, since then they would be part of an (a)(2)(A) opinion, and (a)(2)(B) would be superfluous. Neither are they limited to those policy statements and interpretations used as precedent — in fact, if they are used as precedent, they must be published in the Federal Register pursuant to subsection (a)(1)(D). *Tax Analysts and Advocates v. IRS*, 362 F. Supp. 1298, 1303-04 (D.D. C. 1973), *aff'd in part, rev'd in part on other grounds*, No. 73-1978 (D.C. Cir., Aug. 19, 1974); K. Davis, *supra*, at 130.

With regard to legislative history, the Senate committee once again restated the words of the Act without explanation or qualification, presumably with the intent that the words of the Act should be given their plain meaning. S. Rep. No. 813, *supra*, at 6. The House Committee, on the other hand, grouped together "statements of policy, interpretations, staff manuals and instructions," stating that "[t]his material is the end product of Federal administration. It has the force and effect of law in most cases, yet under the present statute [old Section 3 of the APA] these Federal agency decisions have been kept secret from the members of the public affected by the decisions." H. Rep. No. 1497, *supra*, at 7.[40] Curiously, this "statement

[40] The same report somewhat qualifies the above statement by adding that "an agency may not be required to make available . . . any advisory interpretation on a specific set of facts which is *requested by and addressed to a particular person*, provided that such interpretation is not cited or relied upon by any officer or employee of the agency as a precedent in the disposition of other cases. *Id.* (emphasis added). Since the term "person" excludes agency personnel (5 U.S.C. §551(2)), this qualifying statement is inapposite to the facts of this case where interpretations are addressed to Regional officials of the General Counsel's Office. In any event, the accuracy of this statement, which appears to conflict with the Senate report, is

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is in the form of a statement of fact, not a statement of intent, and as a statement of fact it seems clearly mistaken; interpretations are made not only as the end product of administration but at any interim stage of administration." K. Davis, *supra*, at 135. Many interim interpretations — *e.g.*, an administrative law judge's opinions, decisions based on interpretations of the law to prosecute A and not B, or to settle with C and not D — are effectively the law. Private parties affected by such agency law should be entitled to have access to it. Thus, this Court should accept the literal words of the statute, as repeated in the Senate report, rather than the somewhat ambiguous "end product" statement written into the House report. *Tax Analysts and Advocates v. IRS, supra*, 362 F. Supp. at 1304.

Statements of agency policy and interpretations such as those contained in advice and appeals memoranda are not in any way preliminary views, but rather are the working law of the agency. As such they are exactly the type of agency directives which Congress required to be made public. Not only will disclosure lead to better justice because affected parties will have a chance to know the agency's law, but public criticism aimed mainly at the agency which has adopted the policy, should have a salutary effect.

[40] (continued) questionable. *See* K. Davis, *supra*, 131-32. Several courts have stated that the House report "represents the thinking of only one house, and to the extent that the two reports disagree, the surer indication of congressional intent is to be found in the Senate report, which was available for consideration in both houses." Benson v. GSA, 289 F. Supp. 590, 595 (W.D. Wash. 1968), *aff'd on other grounds*, 415 F.2d 878 (9th Cir. 1969). *Accord*, Getman v. NLRB, 146 U.S. App. D.C. 209, 212, n.8, 450 F.2d 670, 673 n.8 (D.C. Cir.), *stay denied*, 404 U.S. 1204 (1971); Tax Analysts and Advocates v. IRS, *supra*, 362 F. Supp. at 1304; Consumers Union v. Veterans Administration, 301 F. Supp. 796, 801 (S.D.N.Y. 1969), *appeal dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971).

3. Advice Memoranda Are Administrative Instructions To Staff That Affect A Member Of The Public

Subsection (a)(2)(C) requires every agency to make available for public inspection "administrative staff manuals and instructions to staff that affect any member of the public." As pointed out by the General Counsel (Pet. Br. 42), an earlier version of the bill did not contain the word "administrative." It was inserted by the Senate committee which explained the addition of the word as follows:

> The limitation of the staff manuals and instructions affecting the public which must be made available to the public to those which pertain to administrative matters rather than to law enforcement matters protects the traditional confidential nature of instructions to Government personnel prosecuting violations of law in court, while permitting a public examination of the basis for administrative action [S. Rep. 813, *supra*, at 2].

From this statement, the General Counsel concludes that instructions regarding "administrative matters" must be made public, but that instructions regarding "law enforcement matters" may be kept secret (Pet. Br. 43), a dichotomy which appears plausible.[41] But the General Counsel's assertion that advice memoranda, which deal with administrative enforcement of law, may therefore be withheld

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41 The General Counsel's simultaneous arguments that advice and appeals memoranda do not concern "administrative matters" (Pet. Br. 43), but that they are nonetheless "related solely to the internal personnel rules and practices of an agency," 5 U.S.C. §552(b)(2) (Pet. Br. 37), is incongruous to say the least.

is not plausible because the Senate committee explicitly explained that by law enforcement matters it referred to "prosecuting violations of law in court." The dichotomy, it thus turns out, is between enforcement in court and enforcement in an agency. While the wisdom of Congress' action may be questioned in some particular cases, the Senate report leaves no alternative.

While the explanation given in the House report contradicts the Senate's interpretation, it also contradicts the words of the statute since it would allow withholding of a great deal of policy information which seriously affects the public: "an agency may not be required to make available those portions of its staff manuals and instructions which set forth criteria or guidelines for the staff in auditing or inspection procedures, or in the selection or handling of cases, such as operational tactics, allowable tolerances, or criteria for defense, prosecution, or settlement of cases." H. Rep. No. 1497, *supra*, at 7-8. This statement, which would allow withholding of substantive and procedural agency law contained in staff manuals or instructions to staff, would take back most of what the words of the statute gave. For example, under the House committee's interpretation, IRS staff manuals and instructions to staff would not be available to the public, but the courts have held otherwise. *Hawkes v. IRS*, 467 F.2d 787 (6th Cir., 1972); *Long v. IRS*, 349 F. Supp. 871 (W.D. Wash. 1972); *Long v. IRS*, 339 F. Supp. 1266 (W.D. Wash. 1971). The House report's language is an apparent attempt to amend the Act, already passed by the Senate, without changing the words of the statute. This Court should reject that attempt.

Two courts of appeals, apparently finding the confusion caused by the Committee reports to be hopeless and

rejecting the consequences of a literal reading of the statute as unacceptable, have adopted a third course. In *Hawkes v. IRS*, 467 F.2d 787, 795 (6th Cir., 1972) and *Stokes v. Brennan*, 476 F.2d 699, 701 (5th Cir., 1973), these courts concluded that Congress intended that staff manuals and instructions to staff should generally be disclosed, but that a limited exception would be recognized allowing deletions "to bar disclosure of information which, if known to the public, would *significantly impede* the enforcement process." *Id.* In explanation, the *Stokes* court quoted the following language from the *Hawkes* opinion:

> Law enforcement is the process by which a society secures compliance with its duly adopted rules. Enforcement is adversely affected *only* when information is made available which allows persons simultaneously to violate the law and to avoid detection. Information which merely enables an individual to conform his actions to an agency's understanding of the law applied by that agency does not impede law enforcement and is not excluded from compulsory disclosure under (a)(2)(C).
>
> Far from impeding the goals of law enforcement, in fact, the disclosure of information clarifying an agency's substantive or procedural law serves the very goals of enforcement by encouraging knowledgeable and voluntary compliance with the law. Such clarifying information . . . may be found in the criteria for investigative action; in standards for evaluation and so forth. Materials providing such information are

> administrative in character and clearly discloseable under (a)(2)(C). [*Id.* (emphasis in original; footnote omitted)].

This, in fact, appears to be the course taken by the district court in this case as it ordered disclosure of the advice and appeals memoranda but allowed the deletion of "the names of affiants, and settlement suggestions from the Office of the General Counsel to the regional directors." (Pet. App. C, p. 9a). This result will allow the General Counsel to withhold, until trial, the identity of informers and his settlement strategy. But there is no reason to go further in order to keep secret the General Counsel's instructions concerning his interpretations of the law. In fact, the one thing which the legislative history of subsection 552(a)(2) does make clear is that Congress intended to force agency statements and interpretations of legal and policy matters into public view. Congress embraced the view, later stated by Professor Davis, that "secret law is an abomination." K. Davis, *supra*, p. 137.

D. Advice And Appeals Memoranda Should In Any Event Be Released Because Disclosure Will Not Injure The Consultative Functions Of Government

The Freedom of Information Act mandates disclosure of all identifiable records not specifically exempted, 5 U.S.C. §552(a)(3). Thus, even if advice and appeals memoranda were not required by 5 U.S.C. §552(a)(2) to be made publicly available, disclosure upon request is necessary because the General Counsel has failed to carry his burden of proving the applicability of any exemption. In this respect, defendant's reliance upon exemption 5 is misplaced

because advice and appeals memoranda do not fall within the Congressionally recognized scope of that exemption and because disclosure would not harm the "consultative functions" of government. *See Environmental Protection Agency v. Mink, supra,* 410 U.S. at 87. Courts have generally allowed withholding under exemption 5 only of legal or policy-formative advice, and we suggest that the cases define the proper limits of the exemption. In addition, the fact that the General Counsel himself now makes all of the memoranda available when a proceeding is closed (Pet. Br. 10 n.12) indicates that no significant inhibition to agency policy deliberations would result from their disclosure at a time when they may still be useful to litigants in that and other pending proceedings.

In *Environmental Protection Agency v Mink, supra,* 410 U.S. at 93, 89, this Court recognized that the purpose of the fifth exemption is to permit frank discussion of policy matters in agency deliberations, and concluded that, since protection of purely factual or investigative materials was not necessary to further this purpose, such materials should be disclosed.[42] In reaching this conclusion, it accepted the District of Columbia Circuit's statement that any factual material not inextricably "intertwined with policymaking processes" must be disclosed if

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[42] While the pending amendments to the FOIA would explicitly override this Court's decision in the *Mink* case with regard to the national security exemption (5 U.S.C. §552(b)(1)), they will not affect the portion of that decision dealing with the (b)(5) internal policymaking exemption, except to make clear Congressional agreement with this Court's statements that non-exempt, segregable portions of agency records must be separated and disclosed. *See* H. Rep. 93-1380, *supra,* at 4, 13.

that can be done "without impinging on the policymaking decisional processes intended to be protected by this exemption." *Id.* at 92, *quoting* 150 U.S. App. D.C. 223, 237, 238, 464 F.2d 742, 746, 747 (1973). It also stated that the agency should be given the opportunity to prove by affidavits or other evidence that particular documents fell within the protected policy-formative category and contained no separable, factual information. 410 U.S. at 92.

The factual/policymaking test of *Mink* has been more fully developed by the D.C. Circuit in the case being argued in tandem with this one, *Grumman Aircraft Engineering Corp. v. Renegotiation Board*, 157 U.S. App. D.C. 121, 482 F.2d 710 (1973), *cert. granted*, 94 S.Ct. 2603 (1974),[43] and in *Montrose Chemical Corp. v. Train*, ___ U.S. App. D.C. ___, 491 F.2d 63 (1974). Using a method of analysis very similar to that used by this Court in *Mink*, the D.C. Circuit in *Grumman* recognized that "[p]rotecting the confidentiality of advice given during governmental deliberations prior to actual promulgation of policy is, of course, eminently sensible," but that "the case for applying the privilege, and thus the exemption, is markedly weaker where the documents at stake are not solely part of the consultative and deliberative process, but rather reflect actual decisions communicated outside the agency."

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[43] We note that the Government's Supreme Court brief in *Grumman* reveals that its challenge is apparently not to the Circuit Court's statement of the law, but rather to its application in the Renegotiation process – a process whose peculiar features led to a reversal in *Renegotiation Board v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1 (1974). In *Grumman*, however, the Renegotiation Board's changes of procedures, and decision to begin publishing opinions, have narrowed the issue to a dispute about the finality of the Regional Board's reports under prior practice.

482 F.2d at 718. *See* K. Davis, *supra*, at 159. The D.C. Circuit thus concluded that "a distinction must be drawn between documents composed exclusively for purposes of assisting policy formulation and those which serve to reflect policy already made and announced." 482 F.2d at 719 (footnote omitted). Therefore, Regional Renegotiation Board reports, whose purpose the Court found was to support the agency's decision, had to be disclosed. Similarly here, the General Counsel communicates to the parties the decisions made in advice and appeals memoranda, but he refuses to reveal the policy statements reflected in those memoranda which give the reasons for his decision.

In another carefully reasoned opinion, the D.C. Circuit in the *Montrose Chemical Corp.* case further developed the exemption 5 test. It held that summaries of factual information, prepared by the staff of the Environmental Protection Agency solely to aid the Administrator in making a decision in a complex adjudicatory proceeding for cancellation of DDT registrations, were part of the deliberative process protected by exemption 5, where all of the facts were on the public record and the Administator explained his decision in a 50 page opinion. 491 F.2d at 64-65, 68. Looking to the purpose behind the exemption and relying heavily upon the *Morgan* cases (*see* pp. 21-22, *supra*), the Court declared "that the purpose of exemption 5 is not simply to encourage frank intra-agency discussion of policy, but also to ensure that the mental processes of decision-makers are not subject to public scrutiny." *Id.* at 70 (footnote omitted). In other words, deliberations in the course of making adjudicatory decisions or of formulating policy are protected whether or not the particular materials contain overt recommendations on policy, a result seemingly compelled by the legislative history of the

FOIA (*see* fn. 16, *supra*).[44] Thus, in this case, if Sears were seeking the preliminary drafts of advice and appeals memoranda, *Montrose* would apply, but here Sears is seeking only the advice and appeals memoranda themselves. Since the memoranda are the functional equivalent of the Administrator's 50 page final opinion, they should be disclosed.

The dichotomy between deliberative, policy-formative documents on the one hand, and finalized or decisional documents on the other hand, has also been recognized in other judicial circuits. For example, in *Tennessean Newspapers, Inc. v. FHA*, 464 F.2d 657, 660 (1972), the Sixth Circuit distinguished between documents containing expressions of "preliminary views," opinions, and recommendations made during agency policy deliberations, which fall within exemption 5, and documents that are "finished work product" or final reports, which must be disclosed.[45]

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[44] The *Montrose* court indicated that there might be a distinction between situations "where all facts are already on the record," and a situation "[w]here the factual material is not already in the public domain." 491 F.2d at 71.

[45] *Accord*, Philadelphia Newspapers, Inc. v. HUD, 343 F. Supp. 1176 (E.D. Pa. 1972); *see* GSA v. Benson, 415 F.2d 878 (9th Cir. 1969). *See also* Sterling Drug, Inc. v. FTC, 146 U.S. App. D.C. 237, 243, 450 F.2d 698, 704 (1971) ("internal working papers in which opinions are expressed and policies formulated and recommended" may be withheld, except for factual portions); International Paper Co. v. FPC, 438 F.2d 1349, 1359 (2d Cir)., *cert. denied*, 404 U.S. 827 (1971) (documents withheld "were merely preliminary interagency memoranda, compiled preparatory to the formulation of the Commission's final decisions"). *But compare* Washington Research Project, Inc. v. HEW., No. 74-1027 (D.C. Cir., Sept. 12, 1974) ("evaluative" reports regarding grant applications are protected by exemption 5) *with* Soucie v. David, 145 U.S. App. D.C. 144, 147, 448

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Likewise, advice and appeals memoranda, which are issued after careful examination and consideration, are neither preliminary nor deliberative, and they are not concerned with recommending policy alternatives, but only with informing the Regional Office of what the agency's policy is.

Thus, the recommendations of a law clerk concerning a case in agency adjudication, a document containing the advice of a trial attorney to his section chief as to whether a case should be appealed, or a staff recommendation suggesting which of two alternative policies should be adopted, would generally be exempt. But those situations do not describe this case. Advice and appeals memoranda are not compiled by law clerks, by trial attorneys, or by staff members requested to aid an administrator in formulating policy.

Although the General Counsel refers to these memoranda as "preliminary" and as containing merely his "mental impressions" (Pet. Br. 23) – through his staff attorneys – the fact is that these memoranda generally go through

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45 (continued) F.2d 1067, 1070 (1971) (remanded for determination of whether exemption 5 applied to "the Garvin Report, which evaluates the Federal Government's program for development of a supersonic transport aircraft (SST)") *and* Vaughn v. Rosen, 157 U.S. App. D.C. 340, 484 F.2d 820 (1973), *cert. denied*, 415 U.S. 977 (1974) (remanded to determine whether "evaluations of certain agencies' personnel management programs" are within exemption 5). On remand, the district court in *Vaughn* ordered disclosure of all but a small proportion of the Civil Service reports sought on the ground that they were not advisory opinions or policy recommendations but instead documents which adhered to policy already made. Vaughn v. Rosen, Civ. No. 1753-72, slip. op. 5-7 (D.D.C., Oct. 9, 1974).

several drafts before reaching the final form which is transmitted to the Regional Offices. They do not consist of the type of quick comments or preliminary, subjective views which exemption 5 was intended to protect. They are documents produced by supervisory personnel whose job is to decide whether a party should be permitted access to the process created by Congress to handle labor disputes. We do not contend that suggestions moving from a supervisor to a subordinate need be disclosed, but that agency directives which affect the rights of members of the public, and which by definition move from supervisor to subordinate, should be disclosed upon request. *See, e.g., Stern v. Richardson*, 367 F. Supp. 1316 (1973). Although prepared by attorneys, advice and appeals memoranda are the agency's basic guidelines to its field offices in the handling of cases involving private parties, and as such they are something altogether different from the work product of a private attorney.

In the courts below, as in almost every case under exemption 5, the claim was made that disclosure of these memoranda would inhibit evaluators and make them less candid, thereby thwarting the purpose of the exemption. But this argument proves too much, for the same can be said of every piece of paper reflecting the ideas or views of a government employee, yet every such document is not immune from disclosure. Exemption 5 has not been construed so broadly, but has been applied only in the narrow area of policy formulation in its preliminary stages. Since advice and appeals memoranda are neither preliminary nor recommendatory, but are final and decisional, they are not exempt from mandatory disclosure.

Furthermore, since any inhibiting effect that disclosure might have upon agency deliberations will result whenever

participants know that their views will be made public in the foreseeable future, the fact that the General Counsel himself now discloses all of these memoranda at the close of proceedings (Pet. Br. 10 n.12) indicates that disclosure upon transmittal to the Regional Offices will not inhibit agency discussions. *See M.A. Schapiro & Co., Inc. v. SEC*, 339 F. Supp. 467, 469 (D.D.C., 1972). While the General Counsel may believe that there are other reasons for secrecy, they are not reasons recognized by Congress in the fifth exemption. There is simply no basis for concluding that disclosure here will injure the "consultative functions" of government. *See Environmental Protection Agency v. Mink, supra*, 410 U.S. at 87.

Finally, immediate availability of advice and appeals memoranda will clarify the law, focus the arguments of litigants before the NLRB, and, by increasing the public's knowledge of the General Counsel's views, will encourage voluntary compliance. Also, the benefits which convinced the General Counsel to make these memoranda available at the close of a proceeding – greater public understanding, trust, and criticism of the General Counsel's policies (Pet. Br. n.34) – will be even greater if the public learns of the General Counsel's positions at a time when public comments may still have some effect.

In short, nothing in the legislative history, the policies behind exemption 5, or the relevant authorities would permit the General Counsel to withhold advice and appeals memoranda, and there are substantial reasons why they should be immediately made available to the public.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals.

Respectfully submitted.

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November, 1974.